

## *JUS AD BELLUM*: RELEVANCY IN THE 21<sup>ST</sup> CENTURY

BY

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***JUS AD BELLUM: RELEVANCY IN THE 21ST CENTURY***

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## **ABSTRACT**

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*Jus ad bellum* (Latin for “just war”)--a branch of international law defining the conditions for the use of armed conflict--is under challenge for being irrelevant, invalid, and misapplied. This research paper will explain *jus ad bellum*, describe the processes used by the United States and the international community to use armed force, explore its application for self defense and preventative action, illustrate its use with the conflicts in Kosovo in 1999, Afghanistan beginning in 2001, and the Iraq War of 2003 and highlight the issue of relevancy regarding non-state actors. This paper will offer that the existing construct of *jus ad bellum* is appropriate for meeting today’s ad hoc threats.





## *JUS AD BELLUM*: RELEVANCY IN THE 21ST CENTURY

In the first ten years of the 21<sup>st</sup> Century, the United States has committed its armed forces to two large protracted military conflicts in Afghanistan (2001) and Iraq (2003), to two United Nations (UN)-authorized peacekeeping operations in Liberia (2003) and Haiti (2004), and has sustained military operations for humanitarian assistance in Kosovo (since 1999), all without ever going to war. Since the end of the Cold War in 1989, the U.S. has deployed its armed forces throughout the world on more than 26 occasions<sup>1</sup> citing defense of the nation, protection of citizens both abroad and at home, humanitarian intervention, and the need to counter terrorist activities. The recent debate for increased troop strength in Afghanistan and the costs of sustaining U.S. forces there, in Iraq, and at bases and on deployments around the globe have sparked heated debate over the use of armed force and the authorities required for their application.

How do the U.S. and other nations justify using armed force and how is this decision reached? The branch of public international law on the use of force, called *jus ad bellum* (Latin for “justification to war”), is the body of “law dealing with conflict management, of the laws regarding how states initiate armed conflict; [and,] under what circumstances [is] the use of military power legally and morally justified.”<sup>2</sup> *Jus ad bellum* thus governs the internationally accepted criteria and norms justifying the use of force by states. This paper will focus only on the legal aspects of *jus ad bellum* as binding behavior on states. Any discussion of moral justification, addressed as “just war theory” in ethics and philosophy, will exceed the scope of this project. Further, this paper will describe the processes used by the United States and the international community to

resort to armed force, explore its application in self defense and preventative action, illustrate its use with the conflicts in Kosovo in 1999, in Afghanistan in 2001, and with the Iraq War of 2003, and highlight the issue of relevancy regarding non-state actors. Lastly, this paper will offer that the existing construct of *jus ad bellum* is appropriate for meeting today's *ad hoc* threats.

### Is It War or Armed Conflict?

In public international law, the day-to-day relations between nations exist in a condition of either peace or war. Peaceful relations are exhibited by nations when they maintain law and order, address domestic and international concerns through cooperation, and work to prevent violence.<sup>3</sup> Peace is achieved by nations treating one another with respect, by honoring treaties and obligations and by not acting as aggressors through the use of force or the threat of such use. Peaceful relations allow nations to establish and develop diplomatic and commercial relationships and to amicably enter into treaties or agreements of mutual interest.

War, on the other hand, has been historically defined as a condition between nations characterized by armed hostility<sup>4</sup> to compel a resolution to a dispute.<sup>5</sup> A state of war alters the relationship between nations where the laws of peace (conventional and customary law, diplomatic and commercial relations, and any treaty requirements) are replaced by the laws of war (encompassing the Hague and Geneva Conventions). What would otherwise be criminal acts in most countries during peacetime, the laws of war legitimize: the killing of enemy combatants, the taking of prisoners of war, the detention and internment of enemy aliens, and the destruction or seizure of enemy property. Additionally, a state of war usually suspends or outlaws relationships between belligerent subjects and terminates any contracts, business arrangements, or trade.<sup>6</sup>

A state of war can exist without any hostilities. A declaration of war by a nation serves as intent to conduct hostilities and consequently creates a state of war.

Formerly a legal prerequisite to war, a declaration of war is initiated or announced by a legitimate authority of a state.<sup>7</sup> This declaration changes the nature of the relationship between the two states often severing existing ties, triggers the laws of war and can initiate the transition from peace to war. Since the time of the Greeks, a declaration of war has been used as a precursor to actual fighting, allowing the aggressor to announce the dispute, to declare the intent to wage war, and to provide an opportunity for the adversary to “negotiate a peaceful settlement before the onset of hostilities.”<sup>8</sup> These measures helped justify the use of war where war was viewed as an act of last resort and served as an early form of *jus ad bellum*.

Declared wars commit the whole of the state and their societies to armed conflict. It is understandable then, that as a result of two world wars in the first half of the 20<sup>th</sup> Century, the second of which ended with the use of nuclear weapons, the world has not heard a formal declaration of war since 1942.<sup>9</sup> Instead, nations in conflict since 1945 have refrained from declaring war, choosing to address conflicts by other means short of war. Where war once terminated treaties and diplomatic and commercial relations, these obligations and relationships are now often maintained pending case-by-case review.<sup>10</sup> Further, “a state of war does not have to exist to trigger the laws of war.”<sup>11</sup> States decide to go to war, or short of war, to engage in armed conflict. Whether the conflict is between states or internal to them, the act of armed conflict itself now triggers the application of the laws of war to regulate the conduct of any conflict. States can still

issue declarations, and may wish to for public and political justifications especially regarding the right of self defense,<sup>12</sup> which will be discussed further in this paper.

The non-legal, non-binding use of the term “war” can be found in the soft expressions of “Cold War,” “war on drugs,” “global war on terrorism,” or “war on poverty.” These expressions are not construed to be legal statements or an indication of the intent to enter into armed conflict. Instead they reflect the resolve and political rhetoric used to galvanize the public in a campaign construct to address a societal issue.<sup>13</sup>

States began to renounce war as a legal means of conflict resolution following World War One with the League of Nations. It was not until the use of a nuclear weapon by the United States at the end of World War Two, with its threat of mass destruction, and the formation of the United Nations, that war was no longer recognized as an acceptable legal or societal norm. State-on-state war is no longer accepted as legitimate. It is currently recognized as an event which is regulated by separate bodies of law (laws leading to war, conduct of war) and has lost its importance as a form of conflict resolution between and among states and is now generally referred to as “armed conflict” or “the use of force.” Since 1945, state conflicts (and international law) have been characterized by more “civil strife and internal armed violence”<sup>14</sup> than the pursuit of interstate disputes calling for war.

The United States, emerging as a superpower following World War Two, has resorted to the use of force, short of declaring war, in every decade since. In these instances, the President has occasionally sought authorizations for the use of the armed forces instead of declarations of war, with not all involving combat operations. For *jus ad*

*bellum*, neither a declaration of war nor an authorization to use armed force is needed to trigger the law of war because the existence of armed conflict itself is the controlling circumstance<sup>15</sup> (e.g., the scrambling of U.S. fighter jets when former Soviet bombers would fly over North America unannounced).

### Jus Ad Bellum

In international law, the laws governing armed conflict have evolved in principle and practice over thousands of years and are derived from two sources of law: customary and conventional. Customary law represents those “unwritten rules that bind all members of the community of nations.”<sup>16</sup> It is defined as the laws resulting from the general and consistent practice of states who believe they are acting out of a sense of legal obligation.<sup>17</sup> Conventional law encompasses codified rules which are “binding on nations based on express consent.”<sup>18</sup> Bilateral or multilateral agreements, treaties, protocols, and conventions are all examples of conventional law.

*Jus ad bellum* becomes applicable when conflict between states involves hostile armed force, usually in the form of an identifiable aggressor and defender. It defines those elements of the law of war “intended to prevent armed conflict and, failing prevention, to clarify when war should be waged.”<sup>19</sup> In the First Century B.C., the Romans developed formal laws and practices that restricted the use of force as a measure of last resort. But if armed force was chosen, then going to war contained prerequisites of behavior where war was declared by a recognized authority, the authority notified the adversary, and the adversary had to be given the opportunity to respond and negotiate a peaceful settlement before hostilities began, with peace as the desired endstate.<sup>20</sup> For the Romans and those Western societies that followed into the 17<sup>th</sup> Century, a „just war” was a precondition for the use of military force.<sup>21</sup>

The Peace of Westphalia in 1648 ended the Thirty Years War in Europe<sup>22</sup> ushering in the era of states. Wars of religion sparked and governed by canonical laws and the wars caused by dynastic maneuvering were no longer acceptable as the cost to the social order was too high. The Peace of Westphalia established the principles of sovereignty and modern diplomacy, setting the stage for subsequent wars to focus on the issues of the state instead of the desires of theologians or kings. This system of independent states, known as the Westphalian Order, defined and acknowledged state principles of absolute authority, territorial integrity and non-interference in domestic rule, establishing a construct for political intercourse. Justification for war also changed. “War as a means of achieving justice...[became] a tool for securing national objectives.”<sup>23</sup> The concept of war became a more “legal and recognized right of statehood,” and an entitlement of the state to “achieve its policy objectives.”<sup>24</sup> Military strategist Carl von Clausewitz (1780-1831) later commented that war indeed became “a true political instrument, a continuation of political intercourse, carried on with other means.”<sup>25</sup> Now the states could use war as an instrument of national power, thereby making war an acceptable recourse for conflict resolution, not the means of last resort. This is known as the War-as-Fact Period in international law.

The beginning of the 20<sup>th</sup> Century saw industrial age technologies improving the lethality of war (e.g., machine gun, submarine) and outpacing tactics, prompting national leaders and academics to call for controls on the impact of war, resulting in the Hague Conferences (1899-1907).<sup>26</sup> For *jus ad bellum*, the Convention Relative to the Opening of Hostilities (Hague Conference of 1907, Hague III) was adopted and enacted at The Hague, Netherlands on 26 January 1910.<sup>27</sup> This convention was the “last multilateral

law that recognized war as a legitimate device of national policy”<sup>28</sup> and, as an international agreement by the signatory powers, codified that states should not commence hostilities toward one another without prior notification of intent.<sup>29</sup>

Following the “War To End All Wars” (World War One or The Great War) and with the intent to establish a collective security treaty to prevent such wars, U.S. President Woodrow Wilson introduced the formation of the League of Nations as part of the proceedings of the Treaty of Versailles in Paris in 1919. The League and its Covenant “accepted the obligation not to resort to war” and agreed to use “international law as the actual rule of conduct among Governments” thereby renouncing war to settle disputes. With 31 initial signatories,<sup>30</sup> the League of Nations sought “to promote international co-operation and to achieve international peace and security.”<sup>31</sup> Despite the apparent ban on war, the League’s Covenant (Art. 8 and 16) does provide for state self-defense and enforcement of the collective security agreement of the treaty,<sup>32</sup> thus preserving *jus ad bellum* as a determinate to resort to armed conflict. When the League was unable to prevent the various international military aggressions of the 1930’s leading into World War Two, it proved ineffective as an international body, was absorbed into the formation of the United Nations in 1945, and dissolved as an international organization in 1946.

In 1927, in a bilateral approach separate from the League of Nations, France offered the United States a ban on all war between the two nations.<sup>33</sup> The U.S. Secretary of State, Frank B. Kellogg, counter proposed a more inclusive ban on war which resulted in the Pact of Paris, also known as the Kellogg-Briand Pact of 1928 or the Treaty for the Renunciation of War, calling for a “treaty between the United States

and other Powers providing for the renunciation of war as an instrument of national policy.”<sup>34</sup> While accepted by those countries most affected by the wholesale destruction of World War One, the Pact lacked any enforcement mechanisms and it, too, failed to prevent the aggressive actions by Japan, Italy and Germany in the 1930’s and consequently, World War Two.

Despite twenty years of effort to ban war, the United States was drawn into another conflict on an even greater scale than World War One. On December 7, 1941 Japanese armed forces attacked the territory of the United States, its armed forces and its citizens at the U.S. naval base at Pearl Harbor, Hawaii, triggering *jus ad bellum*. The next day, U.S. President Franklin D. Roosevelt asked for and received a Congressional declaration of war against Japan. Three days later, following declarations of war by both Germany and Italy against the United States, President Roosevelt asked for and gained separate Congressional declarations of a state of war against those countries.<sup>35</sup>

#### On Who’s Authority?

So how does the United States resort to war or use armed force? The U.S. Constitution separates the powers of government into a construct of checks and balances to prevent the abuse of power. The President is responsible for waging war, but only the Congress can declare war. The Constitution empowers the Congress to declare war and to raise and support the armed forces. This is consistent with Congress’s administrative responsibilities and inherent power to manage the state through laws, taxes, debt payment, the regulation of commerce and to “provide for the common Defence.”<sup>36</sup> Congress serves as a legitimate authority for representing the whole of the state to the international community should the state pursue war.



The President is designated as the Commander in Chief of the armed forces<sup>37</sup> and is vested with Executive power to ensure that the laws of the state are carried out and to direct the actions of the Executive Branch to accomplish the needs of the state. He also serves as the Head of State, receiving foreign representatives and executing the power to make treaties,<sup>38</sup> thus giving him the power and responsibility for foreign affairs. Nowhere in the Constitution is the Congress authorized to commit or employ the armed forces and nowhere does the Constitution require the President to seek the advice and consent of Congress or anyone else before employing the armed forces. Further, nowhere in the Constitution are the powers and responsibilities of the President or Congress subordinated to any international law (Article VI, Supremacy Clause).

The use of the military as an instrument of national power to shape a U.S. foreign policy agenda or to influence international events is the purview of the Presidency. Commitment of the military abroad does not necessarily trigger *jus ad bellum* because the military performs many missions not involving armed conflict or force (e.g., training, assistance, humanitarian relief). As Commander in Chief, the President has the inherent Constitutional authority to employ the armed forces short of a need to declare war. Congress can counter the President's use of force by exercising its Constitutional powers to refuse to fund the military operations in question. While "refusing to fund actions necessary to fulfill our treaty obligations might violate international law, it does not violate the Constitution."<sup>39</sup>

Wanting a greater voice in the commitment of troops to combat following the Korean and Vietnam Wars, where war was never declared, and perceiving an "erosion of congressional authority to decide...the use of armed forces,"<sup>40</sup> Congress passed the

War Powers Resolution (WPR) (Public Law 93-148) in 1973. The WPR limits the authority of the President to “introduce U.S. forces into hostilities or imminent hostilities...pursuant to (1) a declaration of war; (2) specific statutory authorization; (3) a national emergency created by an attack on the United States or its forces.” Enacted by Congress over the veto of President Nixon, the WPR has been declared unconstitutional by every President since then as a direct infringement by Congress on the inherent authorities of the President as Commander in Chief.<sup>41</sup> The President has chosen instead to welcome the “support” of Congress through legislative authorizations to employ U.S. forces in overseas conflicts supporting national interests, not that he is “required” to do so.<sup>42</sup> Congress, not wanting to be seen by the public for failing to support the armed forces, has generally supported the President’s requests.

Internationally, the legal framework governing the use of force is set forth in the United Nations (UN) Charter, created “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>43</sup> It prohibits the use of force (war, armed conflict, threat of force) to resolve disputes between and among states. The Charter bans the “threat or use of force” against “the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>44</sup> All the states of the world have accepted and endorsed this prohibition.<sup>45</sup> There are two exceptions to this ban: (1) “the inherent right of individual or collective self-defence if an armed attack occurs”<sup>46</sup> and (2) the Security Council...”may take such action...as may be necessary to maintain or restore international peace and security.”<sup>47</sup> To clarify, the recourse of states to use force against another state is legitimate only when a state declares self defense or when the UN

Security Council (UNSC) authorizes its use. These two exceptions represent the acceptable conditions for the use of force in international law, notwithstanding existing treaties and other binding agreements.

Unfortunately there have been hundreds of conflicts<sup>48</sup> triggering the application of *jus ad bellum* since the formation of the United Nations in 1945. For the United States, its involvement in Kosovo (1999), Afghanistan (2001) and Iraq (2003) each deserve an examination of the resort to force.

#### Kosovo 1999

The United States entered into the Kosovo conflict without a justification based upon self defense nor a UN Security Council mandate. Rather, the U.S., with its North Atlantic Treaty Organization (NATO) partners, having exhausted all efforts to negotiate a peaceful settlement between Serbia and the Kosovars of Albanian descent, intervened to prevent the escalation of a humanitarian crisis and to protect the human rights of the Kosovar Albanians.

In March 1999, Serbian military forces expanded their offensive against ethnic Albanians living in the Yugoslavian province of Kosovo after peace negotiations at the NATO-led Rambouillet Conference in Paris broke off. This offensive led to heightened concern over a worsening of the humanitarian crisis in the region. The United Nations Security Council considered a resolution to enact Chapter VII calling for the use of force, but Russia and China both “blocked efforts to authorize a UN response because they feared setting precedents that would interfere with their own policies in Tibet and Taiwan (for China) and Chechnya (for Russia); and Russia and Serbia were old allies.”<sup>49</sup> This removed the most legitimate legal option for the use of force. Since Kosovo was not recognized as a state and thus ineligible for UN membership, the Kosovar Albanians

could not invoke UN Article 51 for individual or collective self defense. With the memory of the failure of the UN and other regional organizations to respond to Serbian atrocities in Bosnia just a few years earlier, and with “no individual European nation [having] the military or political wherewithal to end [the current] Serbian aggression,”<sup>50</sup> it appeared that the situation in Kosovo was doomed to a repeat of ethnic cleansing.

When U.S.-led negotiation efforts at Rambouillet failed on 23 March, the U.S. Senate passed a non-binding resolution (Senate Congressional Resolution 21) authorizing the President, supporting our NATO allies, to initiate air strikes against the Federal Republic of Yugoslavia (Serbia and Montenegro).<sup>51</sup> With this backing, on 24 March 1999, President Clinton committed U.S. forces in support of NATO air operations. Despite Senate endorsement, Congress never declared war nor provided an authorization to use force. Without the ability to claim these actions as collective self defense and without an authorization from the UN, the resort to force by the U.S. and NATO needed to reflect some tie to UNSC resolutions already in effect. Absent this connection, NATO’s intervention set a precedence for the use of force not accommodated within the UN or international law.

The “coalition of willing” states belonging to NATO justified their intervention in Kosovo under UN Security Council Resolutions (UNSCR) 1160, 1199 and 1203.<sup>52</sup> While the UN Charter does not provide for humanitarian intervention and “there is no general doctrine of humanitarian intervention in international law,”<sup>53</sup> the three UNSC resolutions did include demands for cessation of hostilities and the need for humanitarian assistance, thus setting the conditions for intervention. NATO’s actions in intervening were seen not as a violation of the territorial integrity or sovereignty of Yugoslavia as

might be expected, but more clearly viewed as the defense of a population in a large scale crisis reflecting disproportionate distress on humanity and requiring immediate intervention. The previous UN Resolutions had been ignored by the Serbs and the effects of Serb actions had created a humanitarian crisis in the eyes of NATO and others in the international community that warranted a response sensitive in time and scale to stop unacceptable suffering.

The armed humanitarian intervention into Kosovo has had an evolutionary effect on *jus ad bellum* and may provide another circumstance for its application. The acceptance by states of the need to protect and preserve human rights and prevent humanitarian disaster is becoming a new norm of state behavior. The use of force for intervention, albeit *in extremis*, is now viewed as justified to protect and defend individuals, and is not seen as a violation of state sovereignty. The use of force to protect and defend human rights without the intent to act as an aggressor against another state in violation of Article 2(4), UN Charter, establishes a new paradigm for *jus ad bellum*.

#### Afghanistan 2001

Whereas Kosovo reflected one end of the *jus ad bellum* spectrum where there was no customary or positive legal justification to use armed force, authorizations to use force following the terrorist attacks against the United States at the World Trade Center and at the Pentagon on September 11, 2001 (9/11) were quickly forthcoming. After the attacks, U.S. President George W. Bush consulted with Congress, seeking a joint resolution authorizing military action against those responsible for the terrorist events in the United States. On September 14, Congress approved Senate Joint Resolution 23 authorizing the President with unprecedented discretion to use military force against any

party (nation, organization or person) associated with the attacks to include those who may harbor such persons.<sup>54</sup> The President signed the resolution into law on September 18 as Public Law 107-40 (PL 107-40) and made the additional statement that in signing the law, he was acknowledging his inherent Constitutional authority to use force<sup>55</sup> as had past Presidents. The President embraced Congress's statutory authorization which recognized his Commander in Chief authorities and he applied it broadly as authorization to execute operations against terrorists both within the U.S. and worldwide.

Noteworthy is that the statutory authorization by Congress gave the President the unbridled power to determine who was culpable, to define the force "necessary and appropriate,"<sup>56</sup> to include those harboring (aiding and abetting) terrorists, and placed no limitations in time or space as to where or when operations should begin or end. In essence, PL 107-40 became a blank check for the President.

The international community also responded to the events of September 11, 2001. On September 12, the North Atlantic Council, as the governing body of NATO, formally invoked Article 5 of the Washington Treaty (North Atlantic Treaty of 1949 establishing NATO),<sup>57</sup> the first such use of its collective security provisions. While the United Nations expressed its condemnation and condolences in UNSCR 1368<sup>58</sup> and asked for compliance with the law in UNSCR 1373,<sup>59</sup> it took no further action because those directly responsible had perished in the attacks and any others who may have been responsible were not yet identified. Any UN resolution or use of Article 51 (self defense) directed at another state would have been unsubstantiated. Nevertheless, within days of the attacks, the President had the endorsement and support of both

Congress and NATO, in addition to his Constitutional authority as Commander in Chief, as leverage in defense of the U.S. and its interests.

On October 7, 2001 the U.S., joined by its NATO allies, executed its authorities to use force by engaging terrorist targets in safe havens within Afghanistan, seeking Osama bin Ladin and the Al Qaeda terrorist network and its supporters.

### Iraq 2002-2003

Barely a year after the September 11, 2001 attacks and with little success in bringing the perpetrators to justice, the Bush Administration focused on Iraq. Convinced that Iraq was in possession of or was seeking to possess weapons of mass destruction, that Iraq was in violation of several UNSC resolutions levied at the end of the Gulf War (1991) which remained in effect--notably the dismantling of Iraq's chemical, biological and nuclear weapons programs--and that these same resolutions included authorizations to use force to establish "peace and stability," as demonstrated in the "no-fly zones over Iraq,"<sup>60</sup> and consequently, that the Iraqi regime posed a threat to U.S. security and national interests, the President announced that he would seek the support of the Congress and would go to the United Nations to express his concerns.<sup>61</sup> As a reminder, the President already had discretionary powers from PL 107-40, applicable against terrorists everywhere; his Constitutional authority as Commander in Chief; and active UN sanctions and authorities under Chapter VII against Iraq. Further, under his authorities of PL 107-40 alone, the President could make the case to engage Iraq short of going to war.

With the media replaying the events of September 11 and President Bush shining in the public light, he engaged both the United Nations and the U.S. Congress concerning the threat from Iraq. The President addressed the UN General Assembly on

September 12, 2002 reaffirming U.S. cooperation with the Security Council regarding Iraq and announcing U.S. willingness to enforce UNSC resolutions should “Iraq refuse to fulfill its obligations.”<sup>62</sup> A week later, the White House floated a joint resolution to Congress which was approved and signed into law by the President on October 16, 2002 as Public Law 107-243 (PL 107-243). The law confers to the President the authority to use the U.S. armed forces “as he determines to be necessary and appropriate...to defend the United States [from] the threat posed by Iraq...and to enforce...[UN] resolutions [regarding Iraq].”<sup>63</sup> In essence, Congress authorized a new war in Iraq and, once again, provided broad discretionary powers to use force without limitations on time or space, no limitations on the duration of authority or use of force, and, unlike PL 107-40, the President was not required to link Iraq to the attacks of September 11, 2001.<sup>64</sup> This new authority was granted to address a different threat posed by Iraq and as articulated by the President.

In signing the law, the President repeated his position from September 2001, that he had sought and received the “support” of Congress, but did not require it, that he retained his Constitutional authorities to use force and that he reaffirmed the Office of the President’s position on the [un]constitutionality of the War Powers Resolution.<sup>65</sup>

On March 20, 2003, six months after the President addressed the General Assembly of the UN calling for action against Iraq, still lacking Iraqi compliance with UNSC resolutions as well as not having a UNSC mandate authorizing the use of force, but armed with Congressional authorization, the U.S. and its coalition allies invaded Iraq.



The actions taken by the President, resorting to force without first meeting the accepted criteria for *jus ad bellum* (self defense or a UNSC mandate), may appear reckless and unsubstantiated on the surface. However, after a closer examination of the threats facing the President and his Constitutional responsibilities, an explanation can be offered for what is described as “preventative self defense.”<sup>66</sup> The terrorist attacks in the United States in 2001, Iraq’s actual use of chemical munitions (a category of weapons of mass destruction) against Iran in the Iran-Iraq War in 1980, and Iraq’s non-compliance, for almost twelve years, with UN mandates to disarm its weapons of mass destruction (WMD) program<sup>67</sup>, all served to convince the White House that proactive measures were needed. Due to the nature of these threats, the President “could not rely solely on a reactive security posture,”<sup>68</sup> where a failure to deter the attack(s) would have massive effects on U.S. citizens and infrastructure. Therefore, rather than wait for another attack, the President chose to resort to force to eliminate the capabilities and capacities of the Saddam regime to employ WMD against the United States and its allies into the future by invading Iraq to effect regime change and to destroy its WMD program. The short-sightedness of this approach is that there is no guarantee that coalition forces will find and destroy all of the WMD or know if the regime had or had not already transferred WMD into terrorist or third party hands. The claim for self defense here is probably insufficient for *jus ad bellum*, but where the UN Security Council and UN members failed to enforce the resolutions regarding Iraq for more than a decade, the U.S. and its allies believed the time had come to act. While the international community differed on the legality of the U.S. invasion, the UN Security Council later passed resolutions “recognizing the occupation of Iraq and generally

supporting the Coalition's plans [for]...a democratic government"<sup>69</sup> without expressly authorizing the use of force.

### Non-State Actors

In the past 200 years, state-on-state armed conflict (aka war) involved only the armed forces of those countries and it was generally understood and practiced that civilian populations were non-combatants and were not to be targeted. The very foundations of the Hague and Geneva Conventions rest on these accepted norms. Since the end of World War Two, states have refrained from engaging in wholesale armed conflict, reacting instead with lower levels of force to the rise in internal conflicts. With the end of the Cold War, the world has witnessed an increasing occurrence of terrorism and the use of insurgency methods to disrupt states. These perpetrators of conflict represent ideologies, religious factions or aspiring political groups and act independently of any state. Labeled violent non-state actors (VNSA), they can be defined as those persons or groups not under state control who use violence to disrupt the social or political apparatus of a state to affect some political, religious or ideological endstate. Violent NSA include terrorists, warlords, guerillas, insurgents, dissident armed forces, drug cartels, liberation movements, freedom fighters, and other confederated violent groups.<sup>70</sup> These actors are often unpredictable, creating unexpected violence against government forces and civilians, diverting government focus and resources. *Jus ad bellum* addresses the actions of these non-state actors through the consideration of individual and collective self-defense, as seen below.

An illustrative example is the role of the Liberation Army of Kosovo (KLA) as a violent non-state actor. The KLA rose up in resistance to the oppressive practices of the Serbian government against the ethnic Albanians living in Kosovo.<sup>71</sup> Their use of

insurgent tactics, often used to provoke Belgrade into over-reacting, caused the international community to shift its focus away from the then current Balkan regional peace and security activities, and slowed or delayed the humanitarian crisis response (mainly due to security concerns).<sup>72</sup> The Serbs claimed internal sovereignty in dealing with the KLA, but the world viewed the Belgrade responses as being too abusive and excessive.<sup>73</sup> Further, the Serbs and the KLA both cried foul often, each accusing the other of excesses as the population suffered. With the Kosovar Albanians disenchanted and feeling forgotten by the West and by their own state leadership, the KLA became their voice and went on to represent all Kosovar Albanians at the Rambouillet Conference negotiations.<sup>74</sup>

The KLA's actions had a big impact on how *jus ad bellum* is applied. In this instance of a non-state actor, the West was forced to shift its attention from other Balkan peacekeeping activities, to negotiate with a little known and unrecognized organization and, when negotiations failed, to intervene to prevent a humanitarian disaster. Large scale humanitarian intervention now became a consideration for the use of force.

In Afghanistan, the presence and role of violent non-state actors, played by the Al Qaeda terrorist network, were the cause of the U.S. use of armed force there. Al Qaeda had deliberately attacked U.S. territory, killing almost 3000 people, and a U.S. response was seen as justified under the rule of self-defense. When the perpetrators of the terrorist attacks in the U.S. on September 11, 2001 were traced to Al Qaeda in Afghanistan, led by Osama bin Ladin and supported by the Taliban government, the UN Security Council already had resolutions in effect<sup>75</sup> condemning the organization and

calling for the surrender of alleged terrorists believed to be training there. Further, the state of Afghanistan under Taliban rule had the sovereign responsibility to prevent the export of armed conflict into other states. While Al Qaeda benefited from the safe haven provided by the Taliban government, the consequences of attacking the U.S. resulted in the use of force against both the government and the non-state actors in Afghanistan.

In the Iraq War in 2003, terrorists, as violent non-state actors, played a minor but emerging role. Iraq had a long history of sponsoring terrorism, mainly to disaffected Palestinian, Iranian and Kurdish dissident groups.<sup>76</sup> The U.S.-led invasion of Iraq in 2003 was perceived as a war against Islam, drawing foreign fighters from surrounding countries and providing Al Qaeda in Afghanistan with the opportunity for a second front. Accountable to only a few and virtually unknown to the Iraqi government, these non-state actors targeted the population and all vestiges of authority with impunity, altering the face of the conflict from regime change to an insurgency with multiple adversarial groups. The continued presence by the Multi-National Force-Iraq (MNF-I) (mandated by a UNSC resolution) was in part justified by the actions of these terrorist groups.

### Relevancy in the 21<sup>st</sup> Century

*Jus ad bellum* has withstood the test of time as a paradigm for justifying the use of force. A value-laden construct supported by international law and reflecting the acceptable norms of state behavior for resorting to force, *jus ad bellum* has been tested by Western societies for centuries and has evolved from justifying war as a last resort (Greeks and Romans), to war as an instrument of the state (Westphalian Order), to the renunciation of war (post World War One), to war in self defense (attack on Pearl Harbor, HI in 1941 and World War Two), to a return of the renunciation of war with

membership in the United Nations and finally, to the disuse of war as a term in favor of “use of force” to address the need for armed force short of wholesale war. More recently, *jus ad bellum* was used and supported by the international community for the humanitarian intervention into Kosovo in 1999 to protect and preserve human rights and prevent a humanitarian disaster from spreading.

*Jus ad bellum* provides the body of law reflecting the current norms of states and the international community for the acceptable use of force when force is justified. This paper described the use of *jus ad bellum* by the United States and by the international community as embodied in the United Nations. It illustrated the application of *jus ad bellum* for humanitarian intervention using the Kosovo crisis, establishing a precedent for a new norm of state acceptability for using force to protect human rights. The application of *jus ad bellum* for self defense was shown in the case of Afghanistan in 2002 and in the case of the U.S.-led invasion into Iraq in 2003, citing preventative self defense. While not the formulaic paradigm that many would like, *jus ad bellum* provides the flexibility to accommodate the laws, political will and cultural values of states as consideration for the resort to force.

State-on-state war is considered unlikely in the 21<sup>st</sup> Century. Instead, the world has seen an evolution away from the use of state armed forces as aggressors (although the Iraqi invasion of Kuwait and the intermittent saber-rattling between India and Pakistan leaves open the possibility of state-on-state conflict) and the emergence of violent non-state actors who target societies as a whole to further their agenda. A handful of the willing, with the aid of technology and instant global communications, can now create the effects of entire armies from the past. The face of armed aggression has

become faceless and elusive, transcending the need for state support by directly engaging governments and societies through the illegal use of armed violence.

*Jus ad bellum* remains valid and relevant as a legal construct for justification to use armed force. Adaptive and flexible to reflect current international law, state norms and political will, it remains acceptable within the international community for addressing today's threats and the use of force well into the 21<sup>st</sup> Century.

## Endnotes

<sup>1</sup> Richard F. Grimmett, *Instances of Use of United States Armed Forces Abroad, 1798-2007* (Washington, DC: Congressional Research Service, Updated February 2, 2009), 14-29, <http://www.fas.org/sgp/crs/natsec/RL32170.pdf> (accessed February 27, 2010). The 26 deployments of armed forces account for initial operations only and do not include training or routine assistance missions, covert, sustainment or drawdown movements of personnel.

<sup>2</sup> *Law of War Workshop Deskbook*, International and Operational Law Department, US Army Judge Advocate General's School, Charlottesville, VA, (June 2005), 3; <http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf> (accessed January 4, 2010); referred hereafter as the "JAG Deskbook."

<sup>3</sup> Jennifer K. Elsea and Richard F. Grimmett, *Declarations of War and Authorizations of the Use of Military Force: Historical Background and Legal Implications* (Washington, DC: Congressional Research Service, Updated March 8, 2007), 22, <http://www.fas.org/sgp/crs/natsec/RL31133.pdf> (accessed February 27, 2010).

<sup>4</sup> *Ibid.*, 23.

<sup>5</sup> Historically, international law defined "war" through a four elements test: (1) a contention (2) between at least two nation states (3) wherein armed force is employed (4) with an intent to overwhelm. Meeting this test labeled a conflict as "war," and triggered the Law of War application. See JAG Deskbook, 4.

<sup>6</sup> Elsea and Grimmett, *Declarations of War*, 23.

<sup>7</sup> "Convention Relative to the Opening of Hostilities (Hague III)," The Hague Conference of 1907, Article I, Avalon Project, Lillian Goldman Law Library, Yale Law School, [http://avalon.law.yale.edu/20th\\_century/hague03.asp](http://avalon.law.yale.edu/20th_century/hague03.asp) (accessed January 24, 2010).

<sup>8</sup> Lieutenant Colonel David P. Cavaleri, United States Army (Retired), *The Law of War: Can 20<sup>th</sup>-Century Standards Apply to the Global War on Terrorism?*, Combat Studies Institute Global War on Terrorism Occasional Papers series, No. 9 (Fort Leavenworth, Kansas: Combat Studies Institute Press, 2005), 15.

<sup>9</sup> The United States declared war against the Axis powers in 1941 and 1942 at the onset of World War Two following the attack on Pearl Harbor, Hawaii. The last declaration was to Bulgaria, Hungary and Romania as members of the Axis Powers on June 5, 1942.

<sup>10</sup> Elsea and Grimmett, *Declarations of War*, 26.

<sup>11</sup> JAG Deskbook, 4.

<sup>12</sup> Elsea and Grimmett, *Declarations of War*, 27.

<sup>13</sup> Michael Wood, "The Law On The Use of Force: Current Challenges," *Singapore Yearbook of International Law and Contributors* 11, (2007): 5, [http://law.nus.edu.sg/sybil/downloads/coming/Wood\\_SYBIL.pdf](http://law.nus.edu.sg/sybil/downloads/coming/Wood_SYBIL.pdf) (accessed April 26, 2010).

<sup>14</sup> Carsten Stahn, "„Jus ad bellum', jus in bello'...'jus post bellum'?—Rethinking the Conception of the Law of Armed Force," *The European Journal of International Law* 17, no. 5 (2007), 923, in ProQuest (accessed April 26, 2010).

<sup>15</sup> Elsea and Grimmett, *Declarations of War*, i.

<sup>16</sup> JAG Deskbook, 20.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Cavaleri, *The Law of War*, 13.

<sup>20</sup> Ibid., 15.

<sup>21</sup> JAG Deskbook, 7.

<sup>22</sup> The Thirty Years War (1618-1648) was a series of undeclared, declared and civil wars involving the Holy Roman Empire, the Spanish Hapsburgs, and the great European Houses of Austria, Sweden, Spain, France, and Germany about religious intolerances (Protestant and Catholic), the influence of the Holy Roman Church, power ambitions by these Houses, and a civil war in Germany. The Eighty Years War (1568-1648) covered the Dutch war of independence from Spanish Netherlands. These wars overlapped in several countries and involved many of the same actors. Noteworthy is that these wars were the equivalent of World War One ("the war to end all wars") with many nations losing fifty to seventy-five percent of their populations. The devastation and carnage of these conflicts reordered Europe through the Peace of Westphalia, redefining war.

<sup>23</sup> Cavaleri, 32.

<sup>24</sup> JAG Deskbook, 9.

<sup>25</sup> Carl Von Clausewitz, *On War*, eds. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1984), Book One, Chapter One, Section 24, 87.

<sup>26</sup> JAG Deskbook, 10.

<sup>27</sup> “Convention Relative to the Opening of Hostilities (Hague III),” The Hague Conference of 1907, Article I, Avalon Project.

<sup>28</sup> JAG Deskbook, 10.

<sup>29</sup> Acceded by the United States on November 27, 1909; see “Convention (III) Relative to the Opening of Hostilities. The Hague, 18 October 1907,” <http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=190&ps=P> (accessed April 21, 2010).

<sup>30</sup> Wilson failed to rally Congress to ratify the Treaty of Versailles resulting in the U.S. not being a signatory and thus not a signatory of the League of Nations.

<sup>31</sup> Yale Avalon Project, Covenant of League of Nations.

<sup>32</sup> Ibid.

<sup>33</sup> Since the United States did not sign the Treaty of Versailles and thus did not endorse the formation of the League of Nations, France wanted to form a series of security alliances due to its fear of a resilient Germany returning as a military state. Specifically, France wanted to involve the U.S. as peacekeepers in an attempt to establish collective security for itself external to France’s alliances in Europe. See Cavendish, R., “The Kellogg-Briand Pact Aims to Bring an End to War,” *History Today* 58, no. 8 (August 1, 2008): 11, in ProQuest (accessed April 26, 2010).

<sup>34</sup> “Kellogg-Briand Pact: 1928,” The Kellogg-Briand Pact-Documents, Avalon Project, Lillian Goldman Law Library, Yale Law School, [http://avalon.law.yale.edu/20th\\_century/kbpact.asp](http://avalon.law.yale.edu/20th_century/kbpact.asp) (accessed April 26, 2010).

<sup>35</sup> Elsea and Grimmert, *Declarations of War*, 3.

<sup>36</sup> U.S. Constitution, art. 1, sec. 8.

<sup>37</sup> Ibid., art. 2, sec. 2.

<sup>38</sup> Ibid., art. 2, sec. 3.

<sup>39</sup> John C. Yoo, “UN Wars, US Powers,” *Chicago Journal of International Law* 1, no. 2 (Fall 2000): 369, in ProQuest (accessed April 26, 2010).

<sup>40</sup> Richard F. Grimmert, *War Powers Resolution: Presidential Compliance* (Washington, DC: Congressional Research Service, September 23, 2009), 1 <http://www.fas.org/sgp/crs/natsec/RL33532.pdf> (accessed April 26, 2010).

<sup>41</sup> Ibid.

<sup>42</sup> Elsea and Grimmert, *Declarations of War*, 6.

<sup>43</sup> Charter of the United Nations, Preamble; see also <http://www.un.org/en/documents/charter/preamble.shtml>.

<sup>44</sup> Ibid., Ch. II, art. 2(4).



<sup>45</sup> All states have agreed and signed the Charter with three exceptions: the Vatican has chosen not to join the UN, Taiwan was replaced by China (One China), and Kosovo is not recognized as a state in the international community. See Member States, *The United Nations Home Page*, <http://www.un.org/en/members/> (accessed January 15, 2010).

<sup>46</sup> UN Charter, Ch. VII, art. 51.

<sup>47</sup> *Ibid.*, Ch. VII, art. 42.

<sup>48</sup> See the Armed Conflict Events Data(base) at <http://www.onwar.com/aced/chrono/index1950.htm> (accessed on January 25, 2010).

<sup>49</sup> Eric A. Posner and Alan O. Sykes, "Optimal War and Jus Ad Bellum," *Georgetown Law Journal* 93, no. 3 (March 2005): 1011, in ProQuest (accessed April 26, 2010).

<sup>50</sup> Yoo, "UN Wars, US Powers," 362.

<sup>51</sup> Grimm, 4.

<sup>52</sup> UNSCR 1203 (Oct 1998) calls for cessation of hostilities, humanitarian assistance and compliance with monitoring efforts; 1199 (Sep 1998) demands a ceasefire; and 1160 (Mar 1998) imposes an arms embargo within all of Yugoslavia. See UN Security Council Resolutions at [http://www.un.org/Docs/sc/unsc\\_resolutions.html](http://www.un.org/Docs/sc/unsc_resolutions.html) (accessed April 26, 2010).

<sup>53</sup> Wood, "The Law On The Use of Force: Current Challenges," 9.

<sup>54</sup> Elisea and Grimm, *Declarations of War*, 17.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Article 5 addresses and activates collective security when any member of NATO is attacked. See Statement by the North Atlantic Council, Online Library, North Atlantic Treaty Organization, <http://www.nato.int/docu/pr/2001/p01-124e.htm> (accessed April 20, 2010).

<sup>58</sup> UNSCR 1368 (12 September 2001), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> (accessed April 20, 2010).

<sup>59</sup> UNSCR 1373 (28 September 2001), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement> (accessed April 20, 2010).

<sup>60</sup> Karl K. Schonberg, "Global Security and Legal Restraint: Reconsidering War Powers after September," *Political Science Quarterly* 119, no. 1 (Spring 2004): 119, in ProQuest (accessed April 20, 2010).

<sup>61</sup> Elisea and Grimm, *Declarations of War*, 19.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, 20.

<sup>64</sup> Ibid, 21.

<sup>65</sup> Ibid., 20.

<sup>66</sup> Miriam Shapiro, "Iraq: The shifting sands of preemptive self-defense," *The American Journal of International Law* 97, no. 3 (Jul 2003): 599 in ProQuest (accessed April 22, 2010).

<sup>67</sup> UNSCR 1441(8 November 2002) includes an affirmation of the post Gulf War mandates of 1991 and finds Iraq in material breach of compliance. See UNSCR 1441 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf?OpenElement> (accessed April 22, 2010).

<sup>68</sup> Shapiro, "Iraq: The shifting sands of preemptive self-defense," 599.

<sup>69</sup> Ibid., 21.

<sup>70</sup> Margaret Buse, "Non-state Actors and Their Significance," *The Journal*, [http://maic.jmu.edu/Journal/5.3/features/maggie\\_buse\\_nsa/maggie\\_buse.htm](http://maic.jmu.edu/Journal/5.3/features/maggie_buse_nsa/maggie_buse.htm) (accessed April 23, 2010).

<sup>71</sup> The KLA formed in 1991 in reaction to a long history of Serbian abuse. See Chris Hedges, "Kosovo's Next Masters?" *Foreign Affairs* 78, no. 3 (May/June 1999): 41 in ProQuest (accessed April 25, 2010).

<sup>72</sup> "NATO's Role in Kosovo," linked from *The North Atlantic Treaty Organization Home Page*, at "NATO and Kosovo: Historical Overview," <http://www.nato.int/kosovo/history.htm#B> (accessed April 25, 2010).

<sup>73</sup> UNSCR 1199 (23 September 1998), linked from *The United Nations Home Page at "UN Security Council Resolutions,"* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf?OpenElement> (accessed April 25, 2010).

<sup>74</sup> Hedges, "Kosovo's Next Masters?" 26.

<sup>75</sup> UNSCR 1267 (15 October 1999), 1333 (19 December 2000) and 1378 (14 November 2001). See [http://www.un.org/Docs/sc/unsc\\_resolutions.html](http://www.un.org/Docs/sc/unsc_resolutions.html) (accessed April 22, 2010).

<sup>76</sup> The Council on Foreign Relations, "Terrorism Havens: Iraq," *The Council on Foreign Relations Home Page*, <http://www.cfr.org/publication/9513/#p6> (accessed April 26, 2010).